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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

Appellant petitions for a rehearing on the following grounds:

I.

The opinion of this court states:

> "And certainly if such tax has a fair relation to the property employed in the state (as this tax clearly does), it cannot be said to run afoul of the prohibition against state taxation on interstate commerce."

This conclusion, that the tax has a fair relation to the property employed in the state, is, we respectfully contend, clearly contrary to the undisputed facts disclosed by the record.

The record discloses (R. 144, 152, 154, 165, 170) that the amount of the tax has no appropriate relationship to

(a) either the number of cars a railroad may have in the state nor (b) to the amount of other property in the state. Indeed the chief tax official of the state in charge of this litigation twice testified that there is no relation between the amount of the tax and the amount of the taxable property (R. 20, 21). The opinion disregards this undisputed evidence. The evidence shows that if the Illinois Central had but one railroad tie projecting into the state instead of 30 miles of railroad, its tax would be *increased!* Thus the "fair relation" said by this court to exist is a relationship which produces this result: the less is the total amount of railroad taxable property the greater is the tax!

Nor does the tax have a "fair relation" to the total number of cars a railroad may have in the state. It may have some relationship to the number of cars *on other lines*, but since it is a *unitary property tax*, it must have an appropriate relationship to the *total amount of the property*, including cars, of the taxpayer in the state. Knowledge common to all, ordinary experience and the record itself show that the thirty-seven railroads which pay no tax under the Burlington formula (R. 35, 37) have many times as many cars (as well as many times the track mileage to which alone reference is made in the decision) in the state as has the Illinois Central. To disregard this evidence and assume that it is possible to operate 1,220 miles of railroad (Milwaukee mileage in Minnesota) with fewer cars than are needed on the 30 miles operated by appellant, makes the decision rest on a wholly indefensible ground. If the decision is sound it must be assumed the larger roads are operated without any cars at all since they do not pay any such tax. It is no answer to say that the tax is on the privilege of renting cars, or that it is a tax on cars on other lines, or that it is a tax on the income as such, because the State of

Minnesota declares, as is its right, that the gross earnings tax is a single property tax on a unitary enterprise. It must therefore be tested by its relation to the total amount of taxable property in the state.

The erroneous decision results from the failure of the court to treat this MEASURE of a unitary property tax as the MEASURE of the *total value of all the property in the state.* This court is not free to treat the tax as a tax only on cars on other lines in the state. It is bound to accept the state's contention and construction of the statute (Appellee's Brief, pp. 20, 24) that it is a single tax on a unitary enterprise. It is not a tax on income. It is not a tax on the cars which may be on other roads. The gross earnings tax is a tax on all the property of the railroad in the state and must therefore be in proportion to the amount of all such property. If this fact, unquestionably true, is accepted by this court, the tax can not be sustained. The fact that the tax is a single tax on all the property as a unit, as is specifically admitted by the state, must be ignored if the decision is to stand. Why should this court disregard the state's announcement that it is a single tax on all the property as a unit, and attempt to justify it as a tax on part of the income or part of the property? Is it not because, if the state's interpretation be accepted and it be treated as a single tax on all the property, it can not be sustained, since the tax increases as the *total* amount of *all* the property decreases? This position of the state is clear and unequivocal. The statement of the Attorney General is but a repetition of the holding of the State Supreme Court. This court accepts the state court's construction of the law concerning what they are trying to tax. At least it says so in the last paragraph of the opinion filed:

> "But on such matters of construction we defer to the state court's interpretation."

We respectfully submit that it can not be sustained as a tax on a unitary enterprise where the tax increases in amount as the unitary enterprise decreases in size. To hold otherwise is a severe strain on the commonly accepted meaning of the word fair.

II.

It is said in the opinion:

> "We have here at most a *recomputation* by the state of taxes payable under a statute which was existent throughout the whole period in question."

This statement ignores Section 2239, Mason's Minnesota Statutes and the formula legally prescribed under it by the Public Examiner. Both statute and formula were existent throughout the whole period in question. It may be admitted that it is a recomputation, but it is a recomputation based on a formula which had no legal existence in 1922-9. And it ignores the valid formula legally adopted under a statute which must also be construed and given effect if the true amount of the tax be correctly determined.

Sec. 2239 provides that the formula must be prescribed by the Public Examiner with the approval of the Tax Commission. A formula was so prescribed. The formula so prescribed under specific legislative authority was followed. Its application in computing the tax was as essential as any other provision of the law. There could be no legal or valid recomputation productive of a result different from that computed in 1922-9, unless Sec. 2239 is ignored.

This court treats the Burlington formula as a part of the law in 1922. It was no part of the law as it existed then. The law then was that the tax must be computed according to the formula legally prescribed pursuant to Sec. 2239. Ignoring this section and substituting the Bur-

lington formula in 1935 is nothing short of an amendment to the statute. Calling it a recomputation can not avoid the fact that it is a recomputation on a basis which had no legal foundation nor legal applicability during the years in question. In short, it is an illegal recomputation.

The Supreme Court of Minnesota evaded this question, apparently because the tax on earnings in 1922-9 can not be sustained, if effect be given to the plain and unmistakable meaning of Sec. 2239. This court is therefore free to adopt its own construction of Sec. 2239. As there is and can be no question about the meaning of this statute (it will scarcely be denied that the legislature granted power to prescribe the formula to the Public Examiner and Tax Commission) we earnestly contend that it should not be ignored.

Conclusion.

Whatever need there may be, as a matter of public policy, to sustain the exercise of a state's taxing power, that question is of no importance here. No attack is made on the right of the state to select gross earnings as the measure of tax liability. There need be no concern about the right of the state to collect such a tax in the future, nor to adopt a new and proper formula for future application.

Reduced to its simplest terms, the sole question is whether appellant owes the state $26,414.59 for unreported taxes in 1922-9. Our trustfulness in the right to follow the law (under Sec. 2239 the formula followed was an integral part of the law) of the State of Minnesota as it then existed, and our confidence that this court will protect that right, impel us to ask for a reconsideration of the case on these two points. We ask the court to construe the Minnesota statutes (Sec. 2246 *plus* 2239) and

decide whether the company had a right to rely on the formula adopted by that agency of the state authorized by the legislature to act. It was for the legislature and not the court to decide who should prescribe the formula. Everything said in the opinion filed may be sound and still the judgment should be reversed if we are right about this.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 222.—October Term, 1939.

Illinois Central Railroad Company, Appellant, *vs.* State of Minnesota. } Appeal from the Supreme Court of the State of Minnesota.

[January 29, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

Minnesota imposes on every railroad company owning or operating lines within its borders a five per cent tax on gross earnings derived from its operation within the state. This tax, payable in lieu of all other taxes,[1] has been sustained by this Court, in various applications, as a property tax.[2] In this case, which is here on appeal (28 U. S. C. § 344a) from a judgment of the Supreme Court of Minnesota (205 Minn. 1, 621), appellant contends that the statute as construed and applied to it violates the Fourteenth Amendment and the commerce clause of the federal Constitution.

Appellant, an Illinois railroad corporation, owns no lines in Minnesota but operates leased lines with 30.15 miles of trackage in that state.[3] It owns or operates about 5,000 miles in other states. The item of gross earnings which the state seeks here to tax arises out of debts and credits for exchange of freight cars which appellant

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[1] Sec. 2246, Mason's Minn. Stats. 1927, provides in part:

"Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages, and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

Sec. 2247 defines "gross earnings" as follows:

"The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state."

[2] Great Northern Railway Co. *v.* Minnesota, 278 U. S. 503; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450; United States Express Co. *v.* Minnesota, 223 U. S. 335.

[3] These are operated under a 47 year lease beginning July 1, 1904, from the Dubuque and Sioux City Railroad Co.

makes with other railroads, the using road being charged $1 per day per car. During the years here involved appellant had credits in its favor for such use of its cars by other roads operating in Minnesota of $17,427,862; and debits owing such roads of $14,924,508, leaving a net credit balance in favor of appellant of $2,503,353. These debits and credits represented use of cars in other states as well as in Minnesota. In absence of adequate and accurate records their use was apportioned to Minnesota pursuant to the following formula:

Each reporting road was charged with such percentage of the credit balance owing from each using railroad as was determined by ascertaining the ratio of each using railroad's Minnesota revenue freight car miles to its system car miles.

Each reporting road was given credit for such percentage of the debit balance owing each other road as was determined by ascertaining the ratio of the reporting railroad's Minnesota revenue freight car miles to its system car miles.

The credit and debit balances were computed and apportioned annually; and the net credits were then ascertained, to which the statutory tax of 5 per cent was applied.

Thus for the year 1922 appellant had credit balances of $691,483.97 owing from 13 other roads. Their Minnesota revenue freight car miles varied from 2.3% to 100% of their system car miles, making Minnesota's proportion of the credit balances $95,359.49. For the same year appellant had debit balances from freight car hire owing to 8 other roads of $215,863.05. Appellant's Minnesota revenue freight car miles were only .11% of its system car miles for that year. Hence, it was permitted to deduct only .11% of $215,863.05 or $237.43, leaving $95,122.06 to which the tax was applicable. On similar computations for each of the following seven years the tax for which the state brought suit totalled $26,414.59.

Appellant's contention under the Fourteenth Amendment is that the statute as applied in the foregoing formula denies it equal protection of the law and due process. We do not think that contention is tenable.

First as to the credit balances. These represent payments to appellant for use of its freight cars by other roads which operate in Minnesota. Minnesota does not seek to reach all of those receipts. As the statute reaches only revenues derived from operations in the state, the formula effects an apportionment. Certainly the ratio of Minnesota revenue freight car miles to system car miles is con-

sistent with the statutory scheme of ascertaining what payments represent use in Minnesota. That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect.[4] Rough aproximation rather than precision is, as a practical matter, the norm in any such tax system.[5]

Second as to the debit balances. As we have said, appellant is not taxed on all of its credit balances but only on that portion which accrues as a result of the use of its cars by others in Minnesota. Hence it is not permitted under the formula to deduct all of its debit balances but only the portion thereof which it pays others for the use of their cars in Minnesota. Certainly if appellant receives $50,000 from one road for use of appellant's cars in Minnesota and pays another road $50,000 for appellant's use of that road's cars outside of Minnesota, it cannot realistically be said that no part of the $50,000 received by appellant has a Minnesota origin. On the contrary, the whole $50,000 paid appellant derives from use of its cars in Minnesota. For Minnesota then to lay a tax on the whole amount (as it does under this formula) is to exercise a jurisdiction which constitutionally is hers. Similarly to permit under the formula a deduction of only those debit balances owing by virtue of the use by appellant in Minnesota of cars of other roads results in determining a net credit balance for its Minnesota activity of renting out and borrowing freight cars. To hold that that net cannot constitutionally be taxed by Minnesota but must be reduced by the amount of payments made by appellant for its use of cars in other states would be to deprive Minnesota of her jurisdiction over property within her borders.[6] For as appellant's cars move over tracks of other roads in Minnesota and as cars of other roads move over its tracks in Minnesota, certain credits and debits accrue. To say that the resultant net credit balance does not derive wholly from operations within Minnesota is to deny the fact.

But the nub of appellant's objection seems to rest on the equal protection clause of the Fourteenth Amendment. Most of its contentions come back to the point that it has only 30 odd miles of tracks in the state. On this phase, appellant makes two points. First, as compared with other roads having extensive mileage in Minnesota, it is permitted to deduct only a small fraction (between .1% and .13%) of its debit balances. Second, it is penalized

[4] Cf. Rowley v. Chicago & Northwestern Railway Co., 293 U. S. 102, 109.
[5] Cf. Dane v. Jackson, 256 U. S. 589, 598-599.
[6] See Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 696.

for having nominal trackage in Minnesota, for roads with no trackage in the state pay no tax on these items though they may have substantial revenues from rentals of cars for use in Minnesota.

We have in substance already dealt with the first of these contentions. All roads operating in Minnesota are taxed on precisely the same, not on different bases. So far as the present incidence of the statute is concerned, the tax is laid on the net credit balances from the business of renting and borrowing cars used in Minnesota. The fact that appellant receives a larger net than others from its Minnesota activity of renting and borrowing cars and hence must pay a larger tax does not mean that Minnesota has overstepped her constitutional bounds. Appellant is not singled out for special treatment.[7] It is not taxed on one formula; the others, on another. They are all taxed pursuant to the same formula; and the formula is adapted to ascertainment of value of property situated in Minnesota. And appellant's contention that the tax is discriminatory because it has only 30 miles of track yet must pay a tax, while others with hundreds of miles may pay none, is beside the point. The business taxed is not adequately measured by trackage alone. Though appellant has but few miles of track in the state, nevertheless its cars are constantly moving over other lines in Minnesota. That produces revenue. A tax on that revenue certainly bears a close relationship to appellant's property in the state which no computation based on trackage can alter.

As to appellant's second objection under this head, little need be said. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do, are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state, as are domestic companies engaged in that business. The fact that that entails burdens is a part of the price for enjoyment of the privileges which Minnesota extends.[8]

Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the "Fourteenth Amendment no more for-

[7] See Southern Railway Co. v. Watts, 260 U. S. 519; American Sugar Refining Co. v. Louisiana, 179 U. S. 89.

[8] See Atlantic Refining Co. v. Virginia, 302 U. S. 22, 31.

bids double taxation that it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds."[9]

Appellant's constitutional objection based on the commerce clause has been adequately answered in the prior decisions of this Court sustaining other taxes levied under this statute.[10] The right of a state to tax property, although it is used in interstate commerce, is well settled. And certainly if such tax has a fair relation to the property employed in the state (as this tax clearly does) it cannot be said to run afoul of the prohibition against state taxation on interstate commerce. As Chief Justice Fuller once said on that point, " . . . by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by referenee thereto, it is not open to attack as inconsistent with the Constitution."[11]

As to appellant's claim of retroactivity, little need be said. We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law; lack of adequate machinery have never been constitutional barriers to a state reaching backward for taxes.[12] Hence the case falls far short of types of retroactive tax legislation which have repeatedly been sustained by this Court,[13] in recognition of the principle that liability for retroactive taxes is "one of the notorious incidents of social life."[14] Certainly where opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law.[15]

In conclusion, appellant contends that the Supreme Court of Minnesota erred in holding that the credits here taxed are "gross earnings" within the meaning of the statute. But on such matters of construction we defer to the state court's interpretation.[16]

Affirmed.

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[9] Ft. Smith Lumber Co. *v.* Arkansas, 251 U. S. 532, 533.

[10] Great Northern Railway Co. *v.* Minnesota; Cudahy Packing Co. *v.* Minnesota; and United States Express Co. *v.* Minnesota, *supra*, note 2.

[11] Postal Telegraph Cable Co. *v.* Adams, *supra* note 6, p. 697.

[12] Florida Central & Peninsular Railroad Co. *v.* Reynolds, 183 U. S. 471; White River Lumber Co. *v.* Arkansas, 279 U. S. 692.

[13] Seattle *v.* Kelleher, 195 U. S. 351; Wagner *v.* Baltimore, 239 U. S. 207.

[14] Seattle *v.* Kelleher, *supra* note 13, p. 360; League *v.* Texas, 184 U. S. 156.

[15] Kentucky Union Co. *v.* Kentucky, 219 U. S. 140, 154.

[16] Chicago Theological Seminary *v.* Illinois, 188 U. S. 662, 674; Stornasli *v.* Minnesota, 283 U. S. 57, 62.